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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6793

GEORGS KRIKMANIS,
PETITIONER,

v.

KEESLER H. MONTGOMERY,
Clerk and
FRED SAMPSON, Officer of
Municipal Court of Roxbury et als,
RESPONDENTS.

PETITION NOT PR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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Opinions Below

The memoranda and orders of the United States Court of Appeals for the First Circuit are not reported and are set forth in the Appendix to this brief. The order and memorandum of the United States District Court is not reported and is set forth in the Appendix to this Brief.

Jurisdiction

The memorandum and order of the Court of Appeals (*infra* p. 8) was entered on May 3, 1972. The Petition for Writ of Certiorari was filed on June 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the Court of Appeals erred in denying the Petitioner's motion for leave to appeal in forma pauperis and holding that the District Court's decision dismissing the Petitioner's complaint was correct.

Statement

On January 29, 1970, Krikmanis, proceeding *pro se,* filed a complaint in the United States District Court for the District of Massachusetts seeking damages against the Clerk and an officer of the Municipal Court of Roxbury for their alleged failure to properly prosecute a criminal complaint for which he had applied. Also named as defendants in the Federal complaint were Detective Sergeant M. King and Detective Lyden of the Boston Police Department. The Federal complaint was dismissed by the Court on October 13, 1970, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. On March 17, 1971, the Court denied Krikmanis leave to file an amended complaint. No appeal from this order was taken.

On June 4, 1971, Krikmanis, proceeding *pro se,* filed a second complaint in the United States District Court for the

District of Massachusetts against the same parties named in the first Federal complaint referred to above. The second Federal complaint was based upon the same allegations and claim for relief as the first complaint. The District Court dismissed the second complaint ruling that the dismissal of the first complaint for failure to state a claim upon which relief could be granted was a final judgment on the merits and was a bar to the second complaint.

Petitioner's "Motion for New Trial and Relief from Order of Court" was denied by the District Court and his motion for leave to appeal in forma pauperis was also denied by said Court. By a memorandum and order entered April 14, 1972, the Court of Appeals affirmed the order of the District Court. Petitioner's subsequent petition for rehearing was denied by the Court of Appeals on May 3, 1972.

Argument

The petition presents no substantial question warranting further review by this Court. The decision of the District Court (*infra*, p. 5) which is supported by a carefully reasoned opinion is correct.

The Court of Appeals in denying the Petitioner's petition for rehearing not only affirmed the District Court's determination that res judicata barred the second complaint, but also indicated that the Court examined the complaint and determined that, notwithstanding the applicability of res judicata, the Federal complaint did not state any "possible cause of action." (*Infra*, p. 9.)

We submit that the decisions of the District Court and the Court of Appeals are correct and are amply supported by the authorities cited therein. (*Infra*, pp. 5-9.)

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Civil Action No. 71-1115-M

GEORGS KRIKMANIS
v.
KEESLER H. MONTGOMERY AND
FRED SAMPSON, ET AL

ORDER

January 4, 1972

MURRAY, DISTRICT JUDGE

This cause came on for hearing on the motions of the defendants to dismiss, and after hearing, and in accordance with the Court's Memorandum of December 30, 1971 allowing said motions, it is ORDERED that the complaint be, and it hereby is, dismissed.

By the Court,
(s) ROBERT J. SMITH, JR.
Deputy Clerk

(s) FRANK J. MURRAY
United States District Judge

MEMORANDUM

MURRAY, D.J. Plaintiff in this action filed a complaint against these defendants and another person on January 29, 1970 (*Krikmanis* v. *Montgomery,* Civil No. 70-188-M). That complaint was dismissed on October 13, 1970, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief could be granted. The court denied plaintiff leave to file an amended complaint on March 17, 1971. The defendants in the present case have filed motions to dismiss this action on the ground, *inter alia,* that it is bar-

red by the doctrine of *res judicata*. It is to this contention that the court now turns.

The dismissal of Civil No. 70-188-M for failure to state a claim upon which relief could be granted was a final judgment, rendered on the merits. Fed. R. Civ. P. 41(b). *See* 2A J. Moore, Federal Practice ¶ 12.09, at 2313 (2d ed. 1968). It is a bar to the present action, which is between the same parties and based on the same allegations and claim for relief. *See Bartsch* v. *Chamberlain Company of America, Inc.*, 266 F.2d 357 (6th Cir. 1959), and *American Nat'l Bank & Trust Co.* v. *United States*, 142 F.2d 571 (D. C. Cir. 1944).

Accordingly, defendants' motions to dismiss this complaint be and they are hereby allowed.

(s) FRANK J. MURRAY
United States District Judge

United States Court of Appeals
For the First Circuit

Misc. No. 586.

GEORGS KRIKMANIS,
PLAINTIFF, APPELLANT,
v.
KEESLER H. MONTGOMERY ET AL,
DEFENDANTS, APPELLEES.

[U.S.D.C., Mass. Civil No. 71-1115-M.]

MEMORANDUM AND ORDER
Entered: April 14, 1972

Treating Krikmanis' papers as an appeal from the denial of leave to appeal in forma pauperis, and it appearing that nothing is sought to be raised that was not raised before, the order of the District Court is affirmed.

By the Court:
(s) DANA H. GALLUP
Clerk.

(cc: Mr. Krikmanis and Messrs. O'Leary and Hyson.)
(Cert. cc: Clerk, U.S.D.C., Mass.)

United States Court of Appeals
For the First Circuit

Misc. No. 586.

GEORGS KRIKMANIS,
PLAINTIFF, APPELLANT,
v.
KEESLER H. MONTGOMERY ET AL,
DEFENDANTS, APPELLEES.

Before ALDRICH, Chief Judge,
MCENTEE and COFFIN, Circuit Judges.

MEMORANDUM AND ORDER
Entered: May 3, 1972

Following our affirmance of the district court's denial of plaintiff's request to appeal in forma pauperis he petitions for rehearing. In our order of affirmance we considered and approved of the district court's dismissal of plaintiff's cause of action on the grounds of res judicata. Plaintiff now asserts that res judicata was incorrectly applied because his present action includes, in addition to allegations previously made, some incidents that occurred after the dismissal in the first case. We adhere to our holding that res judicata was properly applied. The incidents subsequent to the dismissal of the first action, to the extent we can understand them at all from plaintiff's confused pleadings, are of the same kind and quality as those alleged as the basis of the first suit. The mere fact that new incidents are alleged of a similar nature does not prevent the first action from being res judicata. See generally, Developments in the Law — Res Judicata, 1952, 65 Harv. L. Rev. 818, 827; see also Wright and Miller, Fed-

eral Practice and Procedure §1357 and cases cited at note 20.

In order to grant plaintiff, appearing pro se, every possible consideration we have taken the time on petition for rehearing to consider whether, notwithstanding the applicability of res judicata, he has stated any possible cause of action in this case. We have read his pleadings with care and can find none.

Rehearing denied.

By the Court:
(s) DANA H. GALLUP
Clerk.

(cc: Mr. Krikmanis and Messrs. O'Leary and Hyson.)